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IN THE

SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES OF AMERICA *ex Rel.* GEORGE L. FOREMAN, PETITIONER,

vs.

GEORGE VON L. MEYER, SECRETARY OF THE NAVY, RESPONDENT.

PETITION FOR WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PATRICK H. LOUGHRAN,
Barrister Building, Washington, D. C.,
Attorney for the Petitioner.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully represents as follows:

First.

That on or about December 18, 1912, a petition for writ of error to the Court of Appeals of the District of Columbia to review, under section 250 of the Judicial Code, that court's decision in the above-entitled cause (38 App. D. C., 472) was presented to the Honorable Chief Justice of the Supreme Court of the United States. The said petition was returned to counsel for petitioner, leave being granted him by the Chief Justice to submit the petition in open court with printed brief in support thereof, after reasonable

notice to counsel for respondent. As shown by acknowledgment of service appended hereto, counsel for respondent were notified on January 8, 1913, that on the 27th day of January, 1913, or as soon thereafter as petitioner's counsel can be heard, petition for the writ, and brief in behalf of it, would be presented. The petition and the brief in support of it (thirty copies) are presented herewith under the same cover, and are accompanied with nine copies of the transcript of the record in the Court of Appeals of the District of Columbia.

Second.

The proceedings in the cause and a statement of the questions raised and adjudicated in the courts below are stated, on behalf of the petitioner, as follows:

On March 11, 1911, George L. Foreman filed in the Supreme Court of the District of Columbia a petition for mandamus to compel the Secretary of the Navy to record Foreman's name upon the register of retired officers of the Navy as a paymaster's clerk from the 27th day of June, 1910. The petition alleged that—

> "the acts of the respondent in refusing to place your petitioner's name upon the register of retired officers of the Navy are arbitrary and contrary to law,"

and have deprived him—

> "of enjoyment of a right under the laws of the United States,"

and that his—

> "right to retirement is established by his appointment, acceptance, and agreement, oath, and service aforesaid (all as paymaster's clerk), and by the provisions of section 1444, Revised Statutes of the United States and the act of Congress of June 24, 1910 (36 Stat., 606)." (See Record, pp. 7 to 13, inclusive.)

The case was argued and submitted under a demurrer to the respondent's answer. The court overruled the demurrer, saying, in part (see Record, pp. 2 to 6, inclusive):

> "The relator claims that he is entitled to be retired under section 1444, Revised Statutes, because he has reached the age of sixty-two years. It is not at all clear that he could be retired under that section, or that it was the intention of Congress that a paymaster's clerk should be included therein. Section 1445, Revised Statutes, provides that certain officers therein named shall not be placed upon the retired list, except on account of physical or mental disability, and they are excepted from those entitled to retirement under section 1444. Among those officers so excepted are assistant paymasters and passed assistant paymasters, and it would hardly be supposed that Congress intended that officers in the pay department of the Navy, of less rank than assistant paymasters, should have the benefit of such retirement, while their superiors were expressly excluded from such benefit.
>
> "It seems to me to be very questionable whether the Secretary of the Navy can retire any paymaster's clerk under the facts contained in the answer of the respondent herein, and equally doubtful whether the relator has a right to retirement under the said sections, as claimed by him in his petition; and the whole subject is so debatable that it does not seem competent for the court in a mandamus proceeding to direct the Secretary as prayed in the petition."

Thereafter an amended petition was filed containing the same allegations as those quoted hereinbefore from the original petition (see Record, pp. 7 to 13, inclusive). The answer to the amended petition contains, *inter alia*, the following (see Record, pp. 21 to 30, inclusive):

> "Further answering the said amended petition, the defendant avers that for years past the officials of the Navy Department and the officials of the Treasury Department who have charge of the pay of persons appointed to hold similar positions to those held by

the petitioner, have construed the appointment and position of such persons to be that of a civil employee, and not as an officer of the Navy. The defendant is informed and believes, and therefore avers, that at no time since the fourteenth day of August, A. D. 1893, has the petitioner been paid as an officer of the Navy, nor has the pay received by him come out of the appropriations made by Congress from which officers of the Navy are paid, but that the said George L. Foreman has at all times since September 11, A. D. 1893, been paid out of the appropriation known as 'Pay Miscellaneous,' from which civilian employees in Navy pay offices, as that at San Francisco, California, only are paid.

"The defendant further avers that he is without authority or warrant of law to place the name of the petitioner upon the register of retired officers of the Navy as paymaster's clerk from the 27th day of June, A. D. 1910, as the petitioner is not entitled to such retirement, and was not upon such date, nor during the time referred to in the petition in this cause a paymaster's clerk, United States Navy, nor did said petitioner during such times hold any office which entitled him to retirement as prayed.

"The defendant further avers that the determination of the question whether the petitioner is entitled to be retired as paymaster's clerk, United States Navy, is a matter that rests within the judgment and discretion of the President of the United States of America, under the provisions of section 1444 of the Revised Statutes of the United States."

Such answer was met by demurrer, and under the demurrer the case was again argued and submitted. Again the court ruled against the petitioner, saying, in part (see Record, pp. 34 to 36, inclusive):

"This legislation, antedating the enactment of said section 1444 in Revised Statutes of 1878, indicates that it was not contemplated by Congress that officers were to be retired on reaching the age of sixty-two years, unless they had been continuously in the service for forty-five years, and for that reason, the re-

> lator, even if he is an officer within the meaning of that section, which is questionable, fails to show a clear case entitling him to the right of retirement, or a plain administrative duty on the part of the Secretary of the Navy to place his name on the list of retired officers."

From the foregoing it is evident that the Supreme Court of the District of Columbia, in its second opinion, receded from the position taken in its first opinion. The court's first ruling was that Foreman was not entitled to retirement, because section 1444 expressly excluded from retirement for age certain officers in the pay department of rank higher than a paymaster's clerk and, therefore—

> "it would hardly be supposed that Congress intended that officers * * * of less rank * * * should have the benefit of such retirement while their superiors were expressly excluded from such benefit."

The court's second ruling was to the effect that—

> "even if he is an officer within the meaning of that section (sec. 1444)"

the fact that it is not shown that he—

> "had been continuously in the service for forty-five years"

is, in itself, sufficient to prevent his retirement under that section—in other words, in the second opinion the court ruled that no officer is eligible for retirement under section 1444 unless he—

> "had been continuously in the service for forty-five years"

prior to attaining the age of sixty-two years.

In neither of the said two opinions, however, was it affirmatively held that Foreman, as a paymaster's clerk, was not an officer of the Navy.

An appeal was taken to the Court of Appeals of the District of Columbia, which court on April 1, 1912 (38 App. D. C., 472) affirmed the Supreme Court of the District of Columbia, saying, in part:

> "He (petitioner) was no more an officer of the Navy than any one of the many employees of the Navy Department at Washington. We rule therefore that he never possessed any right to retirement."

The opinion of the Court of Appeals is radically different from the two opinions by the Supreme Court of the District, which two opinions are also different from each other, thus showing three different and wholly dissimilar views of the case; first, that the petitioner is not entitled to retirement because as a paymaster's clerk he was of less rank than an assistant paymaster; second, that he is not entitled to retirement as a paymaster's clerk because he had not served forty-five years in the Navy; third, *that he is not entitled to retirement because he never was a paymaster's clerk, although expressly appointed and serving as such.*

Application was made to the Court of Appeals for removal of the cause to the Supreme Court of the United States on writ of error. On May 6, 1912, such application was denied.

ARGUMENT.

The attention of the court is respectfully invited to what is shown by the pleadings in this case.

In relator's pleadings it was alleged that there existed a duty resting upon the Secretary of the Navy to cause the relator's retirement to be effected and that the performance of such duty was made mandatory by an act of Congress; and, further, that retiring the relator was a purely ministerial act, made so *by the undisputed appointment and service of the relator as a paymaster's clerk and his having attained the age of sixty-two years.* It was further alleged in those pleadings that the respondent had arbitrarily refused to perform that ministerial duty *and that by such refusal the relator had been effectually deprived of the enjoyment of a right under a law of the United States.*

The pleadings on behalf of the respondent alleged that the respondent was without any lawful power or duty whatever to promote or effect the retirement of the relator and that the authority the respondent had and exercised with respect to the retirement of officers of the Navy did not extend to and include persons appointed and serving as paymasters' clerks, as the relator had been appointed and served; *that although expressly appointed and sworn and serving as a paymaster's clerk, the relator was nevertheless always merely a civil service employee.*

At pages 13, 14 and 15 of transcript of the record in the Court of Appeals will be found (Exhibits "A," "B," "C," and "E") *unquestioned copies* of the relator's appointment as "paymaster's clerk," his acceptance and agreement as "paymaster's clerk, U. S. N.," his oath of office as "paymaster's clerk, U. S. N.," and a memoranda showing that he was carried on the pay-rolls of the Navy Department from September 11, 1893, to November 30, 1908, as "pay clerk." The relator was holding office under this appointment when, on July 1, 1906, he attained the age of 62 years, the age for retirement prescribed by section 1444, Revised Statutes. (See Record, p. 9.)

The issues as made by the pleadings were as follows:

1. Did the relator's appointment, oath, acceptance and agreement as a "paymaster's clerk" give him the status and rights of such clerk or constitute him only a mere civil service employee?

2. Did the relator's appointment and service as a "paymaster's clerk" make him an officer of the Navy within the meaning of section 1444, Revised Statutes?

3. Was the relator arbitrarily deprived of a right under a law of the United States when the respondent refused to present his name to the President for retirement under said section?

4. Was the relator a paymaster's clerk within the meaning of the act of June 24, 1910 (30 Stat., 606), on the date of enactment of that statute?

5. Was he arbitrarily deprived of a right under that statute when his application for retirement thereunder was denied by the respondent?

6. Was not the respondent authorized and expressly directed by law to cause the relator to be retired under the admitted facts in the case; and was not respondent's refusal to do so an arbitrary refusal on his part to perform a purely ministerial act?

7. *Did there not exist a power in and a duty resting upon the Secretary of the Navy to cause the relator to be retired, and was not that power arbitrarily withheld from exercise and was not that duty arbitrarily disregarded in and by the refusal of the respondent to cause retirement to be made?*

We submit that the pleadings directly drew in question the existence of a power and duty in the Secretary of the Navy to effectuate an alleged vested right of a citizen under a law of the United States, and that, therefore, the decision of the Court of Appeals of the District of Columbia, in the present case, is reviewable by the Supreme Court of the United States under the fifth subdivision of section 250 of the Judicial Code, which reads as follows:

> "Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question."

If it was the intention of Congress to deny *the right* of review by the Supreme Court of the United States, *under writ of error, to litigants* in cases presenting issues of the character of those made in the present case, certainly it was never the intention of the law-making body wholly to deprive that court of all jurisdiction with respect to such cases, for by the terms of section 251 of the Judicial Code the court is given jurisdiction—

> "in *any* case in which the judgment or decree of said Court of Appeals is made final by the section last preceding * * * to require, by certiorari or otherwise, any such case to be certified to it for its review and determination, with the same power and authority in the case as if it had been carried by writ of error or appeal to said Supreme Court."

Therefore it would seem that the Supreme Court would have jurisdiction in a case of this character to review and determine by certiorari, if in its judgment it would be proper to do so if there existed no right in the litigants to invoke review by writ of error. Whether review in a case of this character is a matter of right by way of writ of error or a matter resting in the discretion of the court to be exercised in action on a petition for certiorari will, therefore, it is believed, be determined by the court in its opinion upon the merits of the present petition for writ of error. Determination of that question by the court should be not less desired by the Government than by other parties to proceedings in which the acts of Government officers are drawn in question.

Respectfully submitted,

GEORGE L. FOREMAN,
By PATRICK H. LOUGHRAN,
His Counsel.